National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: October 31, 1997

TO: Richard L. Ahearn, Regional Director, Region 9

FROM: Barry J. Kearney, Associate General Counsel, Division of Advice

SUBJECT: UFCW Local 1099, (Meijer, Inc.), Case 9-CB-9524

This Section 8(b)(1)(A) and (2) case was submitted for advice on whether the Union unlawfully accepted recognition because it may not represent an uncoerced majority of employees at three newly opened store locations.

In May 1996, the Employer opened the first of five retail stores in the vicinity of Cincinnati, Ohio. The first store to open was the Eastgate store. Following a card check by a neutral third party, the Employer voluntarily recognized the Union and entered into a collective bargaining agreement at the Eastgate store. Under that agreement, the Employer agreed to recognize the Union and apply the agreement at the remaining four area stores upon proof that the Union represented a majority of those employees.[(1)]

In August, the Employer opened three of the remaining four new stores: Fairfield, Loveland and Milford. These stores together employ over 1,800 unit employees. From late July through late August 1996, Union representatives met with employees at these three stores to solicit them to become Union members. The Employer scheduled employees to attend these meetings, which were often held after employees first attended a training session conducted by the Employer. Employees were paid their regular wages for the time they spent attending these meetings with the Union. It appears that one supervisor was initially present at one of these meetings. It also appears, however, that this supervisor was not present when employees executed membership applications.

During these meetings, the Union distributed to employees a "Welcome to the UFCW Union" letter, to which was attached a form for membership application and dues checkoff authorization. The "Welcome" letter stated in the first paragraph, in relevant part:

As a new employee covered by our Labor Agreement with your Employer, you are represented by the UFCW Local 1099. If you are like many new employees, this may be the first time you have been represented by a union and you want to know what this means. Union representation means that UFCW Local 1099, for your benefit, negotiates and administers a legally binding contract with your employer...."

It appears that the membership application and checkoff authorization forms appeared on a second page attached to the two-page, two-sided "Welcome" portion of this letter.

The Region's initial investigation produced evidence from only four Charging Party employees. When the Region directly asked each of the four witnesses whether they thought they had a choice of whether or not to sign the membership application forms, all witnesses responded that they had understood that it was their choice to sign or not. In a follow-up investigation, the Region contacted nine of ten employees who had, subsequent to the opening of these three new stores, requested withdrawal of their Union membership. Five of these employees, presumably not Union supporters, stated that they had believed that the Union was "in the stores," or that they had to sign the membership applications. One employee of these five also understood that the signing of the cards had to do with a majority check; another may have been hired after the card check actually took place. The other four employees interviewed who had withdrawn their membership stated that they had understood that the membership applications were to establish a card majority.

The Region also attempted to contact 50 randomly sampled employees presumed to have been employed during the period prior to the opening of the stores when the organizing meetings were being held. Eight employees were successfully contacted

and replied to questionnaires prepared by the Region. One of the Region's questions was whether the employees were told that signing a membership application was voluntary or mandatory. Employee responses were mixed and sometimes contradictory; about half apparently understood that the Union was conducting a card check, while half believed they had to sign the membership application.

A witness from the Fairfield store stated that he attended a meeting where the Union representative stated that the Union was already in the store and employees had to join because "it was a closed shop." This witness states that some employees said that they didn't want to join and walked out of that meeting. At the Florence store, where three of the original four Charging Party witnesses were employed, none of the witnesses recalls that the Union stated that it was "already in" or that employees had to join the Union. On the other hand, the witnesses also do not recall the Union stating that joining the Union was voluntary. Two witnesses recall a Union statement that employees would be allowed to vote on whether they wished to be represented by the Union. A sole witness recalls that the Union told employees that any employee who joined the Union before the stores officially opened would not have to pay initiation fees. Other witnesses recall being told they would not have to pay initiation fees because they were already hired.

The Union asserts that any misleading effect that the opening paragraph of the "Welcome" letter may have had on employees' decisions to sign a membership card was mitigated by contemporaneous statements during the meetings that the Union had to be selected by a majority of employees in order to be their bargaining representative. The Union also points to a notice it says was posted at the stores announcing that the Union needed to prove that it represented a majority of employees before the bargaining agreement became effective. The Union denies that it told employees it "already was in"; or that the Employer already had recognized the Union and extended the contract to them; or that employees would be allowed to vote on whether they wished to be represented; or that the Union would waive initiation fees for employees who joined before the store officially opened.[(2)]

On August 21, 1996, the Union demanded recognition under the extant bargaining agreement added-stores provision. A local minister who is also a City Counsel representative conducted a card check verifying names of employees via payroll information supplied by the Employer. The minister determined that the Union had obtained signatures from 1,023 employees from the three stores. The following day, the Employer voluntarily recognized the Union and commenced applying the bargaining agreement.

We conclude that the Region should dismiss these charges because there is insufficient evidence to establish that the Union accepted recognition based upon a coerced majority of employees.

The Board will honor union recognition based upon a card check conducted under an "added stores" clause.[(3)] The instant case presents virtually no instances of coercion of cards, viz., violations of Section 8(b)(1)(A) during the Union's solicitation of cards.[(4)] The Region's extensive investigation produced a single employee, among 1,800 employees in the three stores, who asserts that the Union stated that any employee who joined the Union before the stores officially opened would not have to pay initiation fees. Union witnesses deny the above and state that employees were told instead that employees who were already hired would not have to pay an initiation fee. We conclude that this single employee may well have simply misunderstood the Union's version of its initiation fee explanation. Thus, there is insufficient evidence that the Union attempted to coerce membership applications by offering to waive initiation fees.

We note that the "Welcome" letter, to which the membership application and checkoff authorization were attached, arguably misinforms or misleads employees that they are already represented by the Union. This misinformation, however, was not coercive, i.e., does not rise to the level of a threat or promise of benefit.[(5)] The consequence of this arguable misinformation would be its tendency to persuade employees that not signing a membership application would be futile. This in our view raises the issue of whether of not employees intent can be discerned from signatures on membership applications in these circumstances. We have therefore analogized this case to Board cases involving arguable ambiguous authorization cards.[(6)]

In ambiguous card cases, the Union may prove that authorization cards are valid by showing that parol evidence removed the ambiguity. In the instant case, the Region took affidavits from six Union representatives who conducted or attended the card signing meetings. These affiants state that, as part of the Union's standard organizing speech, the Union told employees that

applications for membership would be counted in a card check to determine majority status. All affiants deny that employees were told that they had to sign cards.

We conclude first that there is simply insufficient evidence that the "Welcome" portion of the form misled employees. Regarding the alleged ambiguity, some employees testified that they thought the Union "was already in." To the extent that some employees were influenced in their decision to sign membership applications by an understanding or impression that Union representation was inevitable, this may well be attributed other factors, viz., the Union's truthful statements in organizing meetings that the Union had already signed an agreement covering the Eastgate store, and that it represented Meijer employees in stores throughout Michigan and Northern Ohio. It appears that a large part of the Union's presentations to employees was to extol the benefits of this contract, which could be extended to these employees. Most importantly, no employees testified that they garnered any impression of futility from having read the "Welcome" portion of the form.

Second, it appears that the Union will be able to offer consistent testimony that they explained the need to obtain a card majority, which would constitute parol evidence sufficient to clarify the arguable "ambiguous card" problem.[(7)] In the face of this consistent testimony, employee responses are vague, contradictory, inconsistent and otherwise reasonably explained as noted above. Many employees stated they had scant recollection of what was said at the meetings. It is not clear how many employees who did not provide affidavits would be willing to now testify, whereas Union witnesses appear ready and willing to testify.

In sum, we conclude that there is simply insufficient evidence that the Union accepted recognition based upon a coerced majority, or that the Union's claimed majority was based upon ambiguous cards, or that any arguable ambiguity was not clarified by the Union.

B.J.K.

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[1] The Union's recognition at the Eastgate store appears lawful and has not been challenged.

[2] Regarding initiation fees, Union witnesses assert that employees were told that they would not have to pay an initiation fee because they were already hired, or that anyone hired before the ratification vote or effective date of the contract would have their initiation fees waived. All Union witnesses deny that employees were told that a waiver of initiation fees was contingent upon the signing of a membership card.

[3] See Houston Division of Kroger Co., 219 NLRB 388 (1975).

[4] See generally Shore Health Care Center, Inc. t/a Fountainview Care Center, 317 NLRB 1286 (1995).

[5] Compare Monfort of Colorado, 256 NLRB 612 (1981); Longchamps, Inc., 205 NLRB 1025 (1973).

[6] See, e.g., Nissan Research and Development, 296 NLRB 598 (1989).

[7] The Union also will also be able to point to the notices it states were contemporaneously posted at the stores announcing that the Union needed to prove that it represented a majority of employees before the bargaining agreement became effective.